A **THE PACIFIC BANK BHD v. KERAJAAN NEGERI SARAWAK**

FEDERAL COURT, PUTRAJAYA
RAUS SHARIF PCA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
B AHMAD MAAROP FCJ
ZALEHA ZAHARI FCJ
ZAINUN ALI FCJ
[CIVIL APPEAL NO: Q-01( )-8-2011 (Q)]
23 APRIL 2014

C ***CONTRACT:*** *Guarantee – Limitation of time for demand under guarantee – Claims to be made during guarantee period – Terms and conditions – Claim made six months after expiry of letter of guarantee – Whether restricted period for making claim – Whether offended s. 29 of Contracts Act 1950 – Whether limited respondent's ability to enforce its rights under contract – Whether absolved*
D *guarantor from liability – Whether prior demand a condition precedent to creation of liability in guarantee – Whether right to sue accrued*

LIMITATION: *Accrual of cause of action – Claim on guarantee – Limitation of time for demand under guarantee – Claims to be made during guarantee period –*
E *Terms and conditions – Claim made six months after expiry of letter of guarantee – Whether cause of action accrued – Whether restricted period for making claim – Whether offended s. 29 of Contracts Act 1950 – Whether limited respondent's ability to enforce its rights under contract – Whether absolved guarantor from liability*

F The respondent had issued a timber licence to Niah Native Logging Sdn Bhd ('Niah Native') to extract timber. As a condition for the issuance of the said licence, Niah Native provided a letter of guarantee, issued by the appellant as the guarantor, that Niah Native would pay all royalties due to the respondent under the said licence. The duration of the guarantee was effective from 25 April 1997 until 24 April 1998 and the letter of guarantee
G stipulated that all claims, if any, in respect of the guarantee shall be made during the guarantee period. *Vide* letter dated 8 May 1998, the appellant wrote to the respondent to inform them that the said letter of guarantee had expired on 24 April 1998 and as such, it was cancelled. The respondent, however, did not raise any objection nor disputed the contents of the
H appellant's letter. Even in the absence of the bank guarantee, Niah Native continued to extract timber in the licensed area and failed to pay the royalties to the respondent. The non-payment of the royalties, *ie*, the event of default occurred during the validity period of the letter of guarantee and despite that, the respondent did nothing to call on the letter of guarantee and allowed it
I to lapse. On 20 October 1998, *ie*, six months after the expiration of the letter of guarantee, the respondent made a claim for the outstanding amount of RM118,790.69. The respondent's claim was rejected by the appellant on the premise that the letter of guarantee had expired. The respondent then filed

a suit in the High Court against Niah Native and the appellant as guarantor to the licensee. It was contended that s. 29 of the Contracts Act 1950 ('s. 29') nullified any terms which limited the time within which a party may enforce his rights under a contract. However, the Deputy Registrar allowed the appellant's application to strike out the respondent's writ of summons and statement of claim pursuant to O. 18 r. 19 of the Rules of the High Court 1980 on the ground that s. 29 did not apply to the facts of the case. On appeal, the learned Judicial Commissioner ('JC') reversed the decision of the Deputy Registrar on the ground that s. 29 was applicable to the facts of the case. The appellant's appeal against the decision of the JC was dismissed by the Court of Appeal and the majority judgment found that the letter of guarantee had a limiting effect on the respondent's rights in that it limited the respondent's ability to enforce its rights to make a claim when it was entitled to a six year period of limitation, pursuant to the Limitation Ordinance of Sarawak. However, the minority judgment took the position that the limitation placed on the claim was confined only to the time in which the respondent was entitled to make a demand and did not extend or apply to the time in which it could enforce its claim. The minority decision found that such limitation did not offend s. 29 and drew a distinction between making a claim and enforcing a right. *Vide* this appeal, the question that arose for consideration was whether the terms and conditions in the letter of guarantee which limited the time or restricted the period for making the claim was void ('the question').

Held (allowing appeal with costs)
Per Zainun Ali FCJ delivering the judgment of the court:

(1) Payment was due when there was a default which occurred during the guarantee period and this validity period to claim would conform to the contract between the guarantor and its customer. It must be of a certain or specific period of time, so as to avoid uncertainty that entails in fulfilling the financial obligations on the guarantor's part. A guarantor should not be made liable beyond the precise terms of his commitment. On the facts, the clause in the letter of guarantee limited as to when a right to sue or cause of action would accrue to the respondent. Once the right to sue or cause of action accrues, it did not affect the six years limitation period within which the respondent may sue. Thus, the liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates *(YM Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank*; foll). (paras 91, 92, 93, 94 & 165)

(2) Whether a prior demand is a condition precedent to the creation of liability in a guarantee depends on the precise terms of the contract. The parties had expressly agreed that for liability on the part of the appellant to arise, a claim (demand) must be made during the guarantee period. The respondent had equal bargaining power with the appellant and Niah

Native. It knew exactly where it stood with regards to its rights under the letter of guarantee. Further, it was free to reject the letter of guarantee at the very outset should the clause be viewed as being adverse to its interests. (paras 88, 137 & 138)

(3) A guarantee, unlike insurance, is not a contract *uberrimae fidei*. On the facts, the demand was made six months after the validity period had expired, which meant that the respondent's cause of action did not arise. However, if it was made within time, *ie*, before the expiry of the validity period, the respondent was entitled to enforce his right to payment at any time before the expiry of the period under the Limitation Ordinance (*Heng Cheng Swee v. Bangkok Bank Ltd*; refd). (paras 156 & 160)

(4) Section 29 is only concerned with time limitation as to the enforcement of a right. The operative words are "enforcing his rights". On the facts, the claim or right to the payment by the respondent under the letter of guarantee would be triggered when there was a default by Niah Native. At the occurrence of the default, the affected party was entitled to the payment and the claim must be made during the validity period for it to be a valid claim. The affected party was required to express the assertion or the right to make a claim so as not to amount to a waiver of his rights to the payment. (paras 161, 167-169)

(5) A notice was required from the respondent to the appellant to notify and to prove that Niah Native had breached its obligation and default had occurred. In the event the claim was unsuccessful, further action would be needed by the respondent, eg, by instituting an action in a court of law. This was the enforcement of one's right, which was the second procedural step subsequent to the making of a claim, in the event the claim was not entertained. In this context, a guarantee was given to make a payment in the event a default occurred and it would be reasonable for such obligation to pay by a guarantor within the valid guarantee period. (paras 162 & 163)

(6) The period that comes with making the claim is a limitation to asserting one's right to claim. In the literal interpretation of the said terms of the letter of guarantee, it could not be seen as to how the terms restricted the respondent from enforcing his rights by way of legal proceeding. Neither did the term imply that a party was impeded from taking legal action under the letter of guarantee, because if the claim was satisfied, the question of enforcing the right did not arise. Further, under the English law, a creditor who wished to enforce a contract of guarantee against a surety would have to ensure that his cause of action had accrued. (paras 166 & 171)

(7) The law requires that a demand is needed, not as a pre-condition of liability but as a notice to claim unless it is waived. The time period is a limitation for the making of a claim in the event of a default. Following

the ordinary meaning of the language in the letter of guarantee, the claim must be made within the guarantee period upon an event of default. The word 'claims' which entailed a demand for the payment when default occurred should be construed in its ordinary sense and meaning and thus, the limitation paragraph did not amount to restricting one's right to enforce under s. 29. As such, the impugned clause in the letter of guarantee did not offend s. 29 and the question posed was answered in the negative. (paras 172, 175 & 176)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah mengeluarkan satu lesen pembalakan kepada Niah Native Logging Sdn Bhd ('Niah Native') untuk membalak. Sebagai syarat pengeluaran lesen tersebut, Niah Native telah memberi surat jaminan, yang dikeluarkan oleh perayu sebagai penjamin, bahawa Niah Native akan membayar segala royalti yang perlu dibayar kepada responden di bawah lesen tersebut. Tempoh masa jaminan bermula dari 25 April 1997 sehingga 24 April 1998 dan surat jaminan memperuntukkan bahawa segala tuntutan, jika ada, berkenaan jaminan tersebut mesti dibuat semasa tempoh jaminan. Melalui surat bertarikh 8 Mei 1998, perayu telah memaklumkan kepada responden bahawa surat jaminan tersebut telah tamat tempohnya pada 24 April 1998 dan oleh itu, dibatalkan. Responden, walau bagaimanapun, tidak membangkitkan sebarang bantahan atau mempertikaikan kandungan surat perayu. Walaupun tanpa jaminan bank, Niah Native masih membalak di kawasan yang dilesenkan dan telah gagal membayar royalti kepada responden. Kegagalan membayar royalti, iaitu, keingkaran tersebut berlaku semasa tempoh sah surat jaminan dan walau bagaimanapun, responden tidak melakukan apa-apa untuk menuntut bayaran daripada surat jaminan dan menyebabkannya luput. Pada 20 Oktober 1998, iaitu, enam bulan selepas tamat tempoh surat jaminan, responden telah membuat tuntutan untuk jumlah yang masih terhutang sebanyak RM118,790.69. Tuntutan responden ditolak oleh perayu memandangkan surat jaminan telah tamat tempohnya. Responden kemudian memfailkan tindakan di Mahkamah Tinggi terhadap Niah Native dan perayu sebagai penjamin kepada pemegang lesen. Dihujahkan bahawa s. 29 Akta Kontrak 1950 ('s. 29') telah membatalkan terma-terma yang mengehadkan masa bagi seseorang untuk menguatkuasakan haknya di bawah kontrak. Walau bagaimanapun, Timbalan Pendaftar membenarkan permohonan perayu untuk membatalkan writ saman dan penyata tuntutan responden di bawah A. 18 k. 19 Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan bahawa s. 29 tidak terpakai kepada fakta kes ini. Atas rayuan, Yang Arif Pesuruhjaya Kehakiman ('PK') telah mengakas keputusan Timbalan Pendaftar atas alasan bahawa s. 29 terpakai kepada fakta kes ini. Rayuan perayu terhadap keputusan PK ditolak oleh Mahkamah Rayuan dan keputusan majoriti mendapati bahawa surat jaminan mempunyai kesan mengehadkan hak responden di mana ia telah mengehadkan kebolehan responden menguatkuasakan haknya untuk membuat tuntutan apabila ia layak untuk tempoh had masa enam tahun,

berikutan Ordinan Had Masa Sarawak. Walau bagaimanapun, keputusan minoriti memutuskan bahawa had masa yang dikenakan terhad kepada masa di mana responden layak membuat tuntutan dan tidak boleh dilanjutkan atau dipakai kepada masa di mana ia boleh menguatkuasakan tuntutannya. Keputusan minoriti mendapati bahawa had masa sebegitu tidak bertentangan dengan s. 29 dan membezakan antara membuat tuntutan dan menguatkuasakan hak. Melalui rayuan ini, persoalan yang dibangkitkan untuk pertimbangan adalah sama ada terma-terma dan syarat-syarat dalam surat jaminan yang mengehadkan masa atau tempoh untuk membuat tuntutan adalah tidak sah ('persoalan').

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zainun Ali HMP menyampaikan penghakiman mahkamah:

(1) Bayaran perlu dibuat apabila terdapat kegagalan untuk membayar semasa tempoh jaminan dan tempoh sah untuk membut tuntutan akan mematuhi kontrak yang dibuat di antara penjamin dan pelanggannya. Ia sepatutnya untuk suatu tempoh masa tetap atau spesifik bagi mengelakkan ketidakpastian yang disebabkan dalam memenuhi tanggungjawab kewangan pada pihak penjamin. Seseorang penjamin tidak boleh dipertanggungjawabkan melampaui terma-terma penglibatannya. Berdasarkan fakta, klausa surat jaminan mengehadkan bila hak untuk mengambil tindakan atau kausa tindakan terakru kepada responden. Apabila hak untuk mengambil tindakan atau kausa tindakan terakru, ia tidak memberi kesan kepada tempoh had masa enam tahun di mana responden boleh mengambil tindakan. Oleh itu, liabiliti penjamin bergantung kepada bahasa dalam instrumen tersebut dan sifat liabiliti yang diwujudkan olehnya (*YM Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri Wan Rashid v. Kwong Yik Bank*; diikuti).

(2) Sama ada tuntutan merupakan syarat awalan kepada pembentukan liabiliti dalam jaminan bergantung kepada terma-terma kontrak tersebut. Pihak-pihak telah bersetuju bahawa untuk liabiliti terhadap perayu berbangkit, suatu tuntutan perlu dibuat semasa tempoh jaminan. Responden mempunyai kuasa yang sama dengan perayu dan Niah Native. Ia mengetahui kedudukan haknya di bawah surat jaminan. Tambahan lagi, ia bebas untuk menolak surat jaminan tersebut dari awal lagi jika didapati klausa tersebut adalah bertentangan dengan kepentingannya.

(3) Suatu jaminan, berbeza daripada insurans, bukanlah kontrak *uberrimae fidei*. Berdasarkan fakta, tuntutan dibuat enam bulan selepas tempoh kesahan telah tamat, yang bermakna bahawa kausa tindakan responden tidak berbangkit. Walau bagaimanapun, jika ia dibuat dalam tempoh masa, iaitu, sebelum tamatnya tempoh sah, responden layak untuk menguatkuasakan haknya untuk pembayaran pada bila-bila masa sebelum tamat tempohnya di bawah Ordinan Had Masa (*Heng Cheng Swee v. Bangkok Bank Ltd*; dirujuk).

(4) Seksyen 29 hanya menumpu kepada had masa bagi menguatkuasakan sesuatu hak. Perkataan operatif adalah 'menguatkuasakan haknya'. Berdasarkan fakta, tuntutan atau hak untuk bayaran oleh responden di bawah surat jaminan akan dicetuskan apabila Niah Native gagal untuk membuat bayaran. Semasa kegagalan itu, pihak yang terkilan layak untuk mendapatkan bayaran dan tuntutan perlu dibuat semasa tempoh kesahan untuk menjadikannya suatu tuntutan yang sah. Pihak yang terkilan perlu menyatakan penegasannya atau hak untuk membuat tuntutan supaya ia tidak mengabaikan haknya untuk bayaran.

(5) Suatu notis diperlukan daripada responden kepada perayu untuk memaklumkan dan membuktikan bahawa Niah Native telah memungkiri tanggungjawabnya dan kegagalan untuk membayar telah berlaku. Jika tuntutan tidak berjaya, responden perlu mengambil tindakan lanjut, seperti memulakan tindakan di mahkamah undang-undang. Ini merupakan penguatkuasaan hak seseorang, yang merupakan langkah prosedur kedua selepas tuntutan dibuat, jika tuntutan tidak dilayan. Dalam konteks ini, jaminan telah diberi untuk membuat bayaran jika terdapat kegagalan untuk membayar dan adalah munasabah bagi penjamin membuat bayaran semasa tempoh sah jaminan.

(6) Tempoh membuat tuntutan merupakan had untuk melaksanakan hak seseorang untuk membuat tuntutan. Mengikut tafsiran literal terma-terma surat jaminan, ia tidak boleh dilihat bagaimana terma-terma itu telah mengehadkan responden daripada menguatkuasakan haknya melalui prosiding undang-undang. Terma tersebut juga tidak menunjukkan bahawa sesuatu pihak terhalang daripada mengambil tindakan undang-undang di bawah surat jaminan kerana jika tuntutan dipenuhi, persoalan mengenai penguatkuasaan hak tidak berbangkit. Tambahan lagi, di bawah undang-undang Inggeris, seseorang pemiutang yang berhasrat untuk menguatkuasakan kontrak jaminan terhadap penjamin perlu memastikan bahawa kausa tindakannya telah terakru.

(7) Undang-undang memperuntukkan bahawa tuntutan diperlukan, bukan sebagai pra-syarat tetapi sebagai notis untuk menuntut melainkan jika ia diketepikan. Tempoh masa merupakan had untuk membuat tuntutan apabila terdapat kegagalan untuk membayar. Berdasarkan erti biasa bahasa dalam surat jaminan, tuntutan perlu dibuat dalam tempoh jaminan apabila berlakunya kegagalan untuk membayar. Perkataan 'tuntutan' yang melibatkan suatu tuntutan untuk bayaran apabila terdapat kegagalan membayar mesti ditafsirkan dalam erti biasanya dan oleh itu, perenggan yang mengehadkan tidak mengehadkan hak seseorang untuk menguatkuasakan di bawah s. 29. Oleh itu, klausa tersebut dalam surat jaminan tidak bertentangan dengan s. 29 dan persoalan yang dibangkitkan dijawab dalam bentuk negatif.

Case(s) referred to:

Bank Credit and Commerce International SA v. Ali & Others [2001] 2 WLR 735 ***(refd)***
Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals [2004] 2 CLJ 553 FC ***(refd)***
Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***
Central Electricity Generating Board v. Halifax Corp [1962] 3 All ER 915 ***(refd)***
China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***
Esal (Commodities) Ltd v. Oriental Credit Ltd [1985] 2 Lloyd's Rep 546 ***(refd)***
Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd [1995] 1 CLJ 283 SC ***(refd)***
Financial Institutions Services Ltd v. Negril [2005] 2 LRC 351 ***(refd)***
Food Corporation of India v. New India Assurance Co Ltd AIR 1994 SC 1889 ***(refd)***
Heng Cheng Swee v. Bangkok Bank Ltd [1979] 1 LNS 179 FC ***(refd)***
Insun Development Sdn Bhd v. Azali Bakar [1996] 2 CLJ 753 FC ***(refd)***
Kerajaan Malaysia v. South East Asia Insurance Bhd [2000] 3 CLJ 705 FC ***(refd)***
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***
Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC ***(refd)***
MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors [1990] 1 CLJ 106; [1990] 2 CLJ (Rep) 461 HC ***(refd)***
MBf Insurans Sdn Bhd v. Lembaga Penyatuan dan Pemulihan Tanah Persekutuan (FELCRA) [2007] 6 CLJ 639 CA ***(refd)***
Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd [1987] 2 CLJ 197; [1987] CLJ (Rep) 219 SC ***(refd)***
Nasri v. Mesah [1970] 1 LNS 85 FC ***(refd)***
National Insurance Co Ltd v. Sujir Ganesh Nayak & Co [1997] 4 SCC 366 ***(refd)***
New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230 SC ***(dist)***
NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***
Pearl Insurance Co Ltd v. Atma Ram AIR 1960 Punjab 236 ***(refd)***
Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd [1979] 1 LNS 64 HC ***(refd)***
Ruby General Insurance v. Bharat Bank Ltd AIR (37) 1950 (East) Punjab 352 ***(refd)***
State of Maharashtra v. Dr MN Kaur AIR 1967 SC 1634 ***(refd)***
Stimpson v. Smith [1999] 2 WLR 1292 ***(refd)***
Talasco Insurance Sdn Bhd v. Lembaga Kemajuan Pahang Tenggara (DARA) [1996] 1 LNS 342 HC ***(refd)***
Teknik Cekap Sdn Bhd v. Public Bank Bhd [1995] 4 CLJ 697 CA ***(refd)***
Turner v. Midland Railway Co [1911] 1 KB 832 ***(refd)***
YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2) [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187 SC ***(foll)***

Legislation referred to:

Contracts Act 1950, s. 29
Forests Ordinance, s. 53
Housing Developers (Control and Licensing) Rules 1970, r. 12(1)(r)
Limitation Act 1953, s. 6(1)
Rules of the High Court 1980, O. 14A, O. 18 r. 19

Indian Contract Act 1872 [Ind], s. 28(b)

Other source(s) referred to:

Stroud's Judicial Dictionary of Words and Phrases, 7th edn, vol I, Thomson Sweet & Maxwell 2006, p 841

The Modern Contract of Guarantee, 2nd edn, p 664

For the 1st appellant - Sim Hui Chuang (Lim Lip Sze with him); M/s Kadir Wong Lin & Co

For the respondent - JC Fong; State Legal Counsel, Sarawak

[Appeal from Court of Appeal; Civil Appeal No: Q-01-10-05]

Reported by Kumitha Abd Majid

JUDGMENT

Zainun Ali FCJ:

[1] The appellant's initial success in this suit before the Deputy Registrar was shortlived. The Deputy Registrar had allowed its application to strike out the respondent's writ of summons and statement of claim under O. 18 r. 19 of the Rules of the High Court 1980 on the ground that s. 29 of the Contracts Act, 1950 does not apply to the facts of the case. However that decision was subsequently reversed by the High Court. The High Court decision was later affirmed (by majority) in the Court of Appeal.

[2] By an order made on 25 September 2001, the High Court ordered *inter alia*, that the only issue between the respondent and the appellant was whether s. 29 of the Contracts Act 1950 was applicable to the terms and conditions stipulated in a letter of guarantee made between the parties that require all claims to be made during the one year guarantee period and that such question of law and construction of guarantee be determined under O. 14A of the Rules of the High Court, 1980.

[3] After hearing submission of parties, the High Court Judge reversed the decision of the Deputy Registrar on the ground that s. 29 of the Contracts Act 1950 was applicable to the facts in the case. The High Court thus ordered that:

(i) The order dated 18 August 2008 made by the Registrar be set aside;

(ii) Judgment be entered against the applicant/second respondent for the guaranteed sum of RM100,000 with interest thereon at the rate of 8% pa from the date thereof till the date of full and final settlement; and

(iii) Costs to plaintiff.

[4] The appellant appealed against the whole decision of the High Court Judge on 7 January 2005. However the appeal to the Court of Appeal was dismissed by majority.

[5] Aggrieved by the Court of Appeal's decision, the appellant then filed its leave application before this court.

[6] The appellant's application for leave to this court was granted on 23 March 2011.

Background Facts

[7] The undisputed facts are as follows.

[8] The first defendant in the court below ie, one company called the Niah Native Logging Sdn Bhd ("Niah Native"), was issued a timber licence by the respondent (which is the State Government of Sarawak) pursuant to the Forests Ordinance of Sarawak, to extract timber. As a condition for the issuance of the said timber licence, Niah Native (the licensee) provided the respondent a letter of guarantee ("the letter of guarantee") dated 25 April 1997 as security for the payment of royalties to be charged for the extraction of timber from the licensed area.

[9] Thus the purpose of the letter of guarantee, as issued by the appellant, (as guarantor) was that it guaranteed the respondent that Niah Native would pay all royalties due to the respondent under the said license. In the event that Niah Native fails to pay the royalties due, the appellant as guarantor would then be liable to pay the respondent a sum not exceeding RM100,000. The duration of the guarantee is effective from 25 April 1997 until 24 April 1998.

[10] In consideration of the appellant issuing the guarantee in favour of the respondent, Niah Native's contractor, one Syarikat Mustafa & Ngu Timber Sdn Bhd, issued a letter of indemnity ("letter of indemnity") dated 24 April 1997 in favour of the appellant which was valid for a year (ie, from 25 April 1997 until 24 April 1998).

[11] It would be instructive to have regard to the relevant terms of the letter of guarantee. It reads:

> This guarantee is effective from 25th April 1997 and shall expire on 24th April 1998. All claim, if any in respect of this guarantee shall be made during the guarantee period failing which it shall be deemed to have been discharged and released from all and any liability, under this Guarantee. ("the impugned guarantee clause").

[12] Thus both of the letters of guarantee and indemnity would expire on 24 April 1998. On 14 April 1998, ie, well before the expiry of the said letter of guarantee and indemnity, the appellant informed Niah Native's contractor of the impending expiry of the same and inquired as to whether they wished to renew the said guarantee. There was no response from Niah Native's contractor.

[13] By a letter dated 8 May 1998, the appellant wrote to the respondent to inform them that the said letter of guarantee had expired on 24 April 1998 and that it was thus cancelled.

[14] The respondent duly acknowledged the appellant's 8 May 1998 letter above and did not raise any objection nor did it dispute its content.

[15] It is the appellant's case that the cancellation of the letter of guarantee renders the guarantee null and void and of no further force and effect.

[16] In the meantime Niah Native continued to extract timber in the licensed area, even in the absence of a bank guarantee.

[17] It is undisputed that during the currency of the letter of guarantee, there became due from and payable by Niah Native to the respondent, some royalties and other payments under the timber licence.

[18] Though it is unclear as to when the event of default by Niah Native actually occurred, it transpired that the latter failed to pay the respondent the royalties in the sum of RM685,110.85. However, what is clear and undisputed by the parties is that the non-payment of royalties (ie, the event of default) by Niah Native had occurred during the period of the validity of the letter of guarantee ie, from 25 April 1997 to 24 April 1998.

[19] As at January 1998, Niah Native owed RM118,790.69 in respect of timber royalty. It had defaulted in its obligations to pay the said amount. Although the default occurred during the validity period of the letter of guarantee, the respondent did nothing to call on the letter of guarantee and allowed it to lapse.

[20] Then on 20 October 1998 ie, six months after the expiration of the letter of guarantee, the respondent made a claim for the outstanding amount of RM118,790.69.

[21] The respondent's claim above was however rejected by the appellant, quite obviously on grounds that the letter of guarantee had expired. It is the appellant's case that had it paid the respondent's claim, the appellant would then have no recourse against Syarikat Mustapha & Ngu Timber Sdn Bhd since the letter of indemnity had also expired by 24 April 1998.

In The High Court

[22] The respondent then filed a suit in the High Court against Niah Native on 3 January 2000, for failing to pay royalties and other payments payable under the said licence amounting to RM685,110.85 and against the appellant as guarantor to the licensee.

[23] The appellant in the meantime, filed its summons in chambers (O. 18 r. 19 Rules of the High Court, 1980) dated 19 April 2000 for an order that the respondent's writ of summons of 3 January 2000 and the statement of claim dated 29 December 1999 be struck out.

[24] The Deputy Registrar allowed the appellant's striking out application on 18 August 2000.

[25] However on 19 August 2000 the respondent appealed against the Deputy Registrar's decision. By an order made on 25 September 2001, the High Court ordered, *inter alia*, that the only issue between the respondent and

A the appellant in the suit was "whether s. 29 of the Contracts Act 1950 is applicable to the terms and conditions stipulated in the said letter of guarantee that required all claims to be made during the one year guarantee period that such question of law and the construction of the said impugned clause in the letter of guarantee be determined under O. 14A Rules of the B High Court, 1980".

[26] The High Court reversed the decision of the Deputy Registrar on the ground that s. 29 of the Contracts Act 1950 was applicable and made the order as aforementioned.

C **[27]** The appellant's appeal against the whole decision of the Judicial Commissioner in the High Court was dismissed by majority by the Court of Appeal. The Federal Court on 23 March 2011, granted leave to the appellant to appeal to the Federal Court on the following question as framed:

> Whether the terms and conditions in the Letter of Guarantee which limit the time or restrict the period for making the claim is void?

D

The Majority Decision Of The Court Of Appeal

[28] The majority judgment in the Court of Appeal firstly found that the letter of guarantee had a limiting effect on the respondent's rights in that it limited the respondent's ability to enforce its rights to make a claim, since E it could only claim within the one year guarantee period when in fact the respondent was entitled to a six years period of limitation, pursuant to the Limitation Ordinance of Sarawak.

[29] The majority judgment approved the principles laid down in *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ F (Rep) 230; [1992] 1 MLJ 185. It also found favour with the commercial "common sense approach" which prevailed significantly in *MBf Insurans Sdn Bhd v. Lembaga Penyatuan dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639; [2008] 2 MLJ 398, where it was held that as the breach had occurred **during** the validity period of the letter of guarantee, the fact that G the claim by the respondent was made outside of the guarantee period did not render the claim bad and/or invalid. (emphasis added)

[30] The minority judgment on the other hand, took the position that the limitation placed on the claim was confined only to the time in which the respondent was entitled to make a demand and did not extend or apply to H the time in which it could enforce its claim. The minority decision found that such limitation therefore did not offend s. 29 of the Contracts Act 1950 ("s. 29").

[31] The majority judgment in opposing the above view contended that I the 'time' limitation clause did not absolve the appellant from liability under the letter of guarantee, since this clause was clearly invalidated by virtue of s. 29.

[32] Since the fly in the ointment seems to be the construction to be placed on s. 29 it is pertinent to see how it reads. It reads as follows:

> 29. Agreement to restraint of legal proceedings void
>
> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within he may thus enforce his rights, is void to that extent.

[33] In our view the critical portion of s. 29 ie, the impugned clause is in the second limb of the section which turns on the words:

> ... which limits the time within which he may thus enforce his rights ...

[34] As is clear from a reading of the above provision, if one were to compare the above with the impugned clause of the letter of guarantee which stipulates that:

> ... All claims, if any in respect of this guarantee shall be made during the guarantee period failing which we shall be deemed to have been discharged and released from all and any liability under the guarantee,

a *conundrum* seems to exist. The question therefore is whether the impugned clause in the letter of guarantee limits the time within which the respondent may enforce its rights under the letter of guarantee.

[35] It is the appellant's contention that since the respondent's claim was made after the expiration of the guarantee period, a reading of this in the context of the second limb of s. 29, would make it clear that the appellant was discharged from liability under the letter of guarantee.

[36] The differing views expressed by the courts below drew some interesting insights into the interpretation and construction of s. 29. The learned Judicial Commissioner in the High Court, Sulaiman Daud J (as he then was) observed that:

> The said clause requiring the claim under the guarantee to be made within the one year guarantee period has in my view, the effect of limiting the period which the plaintiff may enforce their right against the second defendant (Niah Native) under the guarantee, and therefore rendered void to that extent by Section 29 of the Contracts Act ...

[37] This view of the High Court was approved by the majority in the Court of Appeal (Justices Abu Samah Nordin and Azhar Ma'ah, Justice Hishamudin Mohd Yunus dissenting) which dismissed the appellant's appeal on 24 June 2010. Basically the majority judgment concurred with the High Court's findings that the terms and conditions of the guarantee had the effect of limiting the respondent to enforce its right to making a claim within the one year guarantee period when in fact the period of six years under the Limitation Ordinance Sarawak had not even expired; that this is contrary to the express provisions of s. 29 and is consequentially void. The majority

judgment approved and followed *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992]) 1 MLJ 185 and also approved *MBf Insurans* case *(supra)*.

[38] It is the appellant case that:

(a) The majority decision in the Court of Appeal erred in law and in fact in adopting the *MBf Insurans* case, in that the majority in the Court of Appeal had failed to appreciate that the terms and conditions of the letter of guarantee are different between the *MBf Insurans* case and the terms of the guarantee in the instant appeal;

(b) The terms and conditions of the letter of guarantee in the instant appeal is clear and unambiguous;

(c) The issue in the *MBf Insurans* case, relates to an insurance guarantee and not a bank guarantee;

(d) The appellant's recourse for issuing the letter of guarantee would depend on the letter of indemnity which expired on the same day as the letter of guarantee. If the respondent failed to make a claim within the validity period, the appellant would then have no recourse against the party who issued the letter of indemnity because the letter of indemnity would have expired;

(e) The terms and conditions of the letter of guarantee was not objected to by the respondent. It only raised the s. 29 issue after the appellant declined to entertain the claim because the letter of guarantee had expired;

(f) In any event, parties ought to be free to impose terms and conditions in a bank guarantee document provided that they are not against the law;

(g) The terms and conditions of the letter of guarantee merely requires the respondent to make a claim within the validity period of the letter of guarantee and it does not contravene the Limitation Ordinance.

[39] It is clear therefore that the position taken by the appellant is neatly encapsulated in the divergent path of the minority judgment of Justice Hishamudin.

[40] What could be discerned from the minority judgment is that:

(i) The limitation of time is only related to the making of a demand;

(ii) The impugned paragraph in the letter of guarantee is not concerned with the respondent's right to enforce the claim and thus the time limitation for the demand to be made in this way was not therefore, a breach of s. 29;

(iii) Great emphasis is placed on the fact that making a claim and enforcing a right are two different things altogether and that for a claim or demand to be valid, there must first be a demand following a breach, which is made within the prescribed time frame and validly taken.

[41] Thus the enforcement of a right only arises if the claim or demand remains unsatisfied. In short, the making of a claim precedes the enforcement of a right. However if the party against whom the claim is made satisfies the claim, then the matter ends there, which means that the question of enforcement does not arise. In short, the making of a claim firstly does not involve a judicial proceeding action (ie, a court action). It is just the making of a demand following a breach (see *Perbadanan Kemajuan Negeri Selangor v. Public Bank Bhd* [1979] 1 LNS 64; [1980] 1 MLJ 172).

[42] Looking again at s. 29, it would appear from a reading of the said section that it is intended to invalidate any contract which:

(i) Absolutely restricts a party from enforcing his rights to sue by the usual legal proceedings; or

(ii) Limits the time within which he may thus enforce his rights.

[43] As had been previously observed, the second limb concerns the curtailment of the limitation period in which a party may sue. It is this second limb of s. 29 which is in contention, for it prohibits any contract which shortens the permitted limitation period in which a party may sue to enforce his rights.

[44] The minority judgment thus draws a distinction between **making a claim** (ie, a demand) which is a preliminary step (and which gives a cause of action here) and **enforcing a right** which it says only arises once the preliminary step (of making a claim) has been taken. (emphasis added)

[45] It is the appellant's case that s. 29 only bars any time limitation as regards the enforcement of the right to sue the appellant; that the said clause in the letter of guarantee does not limit the right of the respondent to sue, nor its right to sue within the prescribed limitation period of six years; that the said clause only limits the period as regards when a claim is made.

[46] The respondent's view as embodied in the majority judgment is that s. 29 applies to nullify any term which limits the time within which a party may enforce his rights under a contact. The respondent's case is that the operative word in s. 29 is "enforce" or "enforcing" since s. 29 is not about making a 'claim' but the enforcement of the respondent's **rights under the letter of guarantee**. (emphasis added)

[47] Thus the question posed by the respondent is this: How and what are the requirements for a claim against the appellant (as guarantor) that the respondent needs to be fulfilled so as to enforce his right under the guarantee for payment thereunder in a court of law?

[48] The answer lies principally in the terms of the letter of guarantee itself, as stated by the Supreme Court speaking through Lee Hun Hoe CJ (Borneo) (as His Lordship then was) in *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187; [1989] 3 MLJ 155, in which His Lordship observed that:

> … The first thing to do is to look at the letter of guarantee. The liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates. A guarantor is therefore entitled to insist on a rigid adherence to the terms of his obligation by the creditor, and cannot be made liable for more than he has undertaken.

[49] Let us now look to the letter of guarantee, ie, its terms and conditions.

[50] It is the respondent's case that the relevant and pertinent terms of the letter of guarantee are these:

> WHEREAS Licence No. T/0169 to take forest produce has been issued by the Director of forests, Sarawak to NIAH NATIVE LOGGING SDN BHD Company no: 44-68 (Tempatan 8276) of Unit 9B, 3rd Floor, Soon Hup Tower, Jalan Maju, 98008 MIRI, SARAWAK AND WHEREAS the Director of Forests has power under Section 53 of the Forest Ordinance to require a deposit of money before the issue of the Licence as security for payment of royalty due thereunder.
>
> Now therefore in consideration of the said NIAH NATIVE LOGGING SDN BHD not being required to deposit a sum of money as provided in Section 53 of the Forest Ordinance, we, hereby guarantee to the Government of Sarawak the payment of all sums of money which may be due to the Government of Sarawak for the payment of royalty or other sum due under Licence No. T/0169 for a period of one year from date hereof.
>
> On notice in writing of any default on the part of the said NIAH NATIVE LOGGING SDN BHD in the payment of any royalty or other sum due under the said Licence being given us, within seven days from receipt of such notice we undertake to pay the Government of Sarawak all sums then due under this guarantee.
>
> Under no circumstances shall our liability hereunder exceed, in the aggregate, the sum of Ringgit Malaysia One Hundred Thousand only (RM100,000.00).

[51] Thus given the above, the respondent contended that by its terms, the letter of guarantee is akin to a payment/performance bond, in which the appellant guarantees payment to the respondent of all moneys due to the respondent by Niah Native Logging Sdn Bhd (the licensee) for the payment of royalty or other sums due under the Forest Licence No. T 0169 for a period of one year. The respondent went on to say that the liability of the appellant to pay and the right of the respondent to enforce a payment under

the letter of guarantee only arises upon notice in writing of any default on the part of the licensee, being given to the appellant. This notice of default is like a demand made on the guarantor, a condition precedent or essential pre-requisite for any application to be instituted in a court of law against the guarantor (appellant) by the respondent (beneficiary) under the guarantee. Thus if there is no demand made on the guarantor (where the terms of the guarantee expressly require such a demand to be made), an action to enforce payment under the letter of guarantee would be dismissed or struck out by the court. (see *MBf Finance Bhd v. Hasmat Properties Sdn Bhd & Ors* [1990] 1 CLJ 106; [1990] 2 CLJ (Rep) 461; [1990] 1 MLJ 180 and *Mok Hin Wah & Ors v. United Malayan Banking Corp Bhd* [1987] 2 CLJ 197; [1987] CLJ (Rep) 219).

[52] By way of illustrating the nature of guarantees which is similar to a performance bond, the respondent relied on the principles in *China Airlines Ltd v. Maltran Air Corp Sdn Bhd & Another Appeal* [1996] 3 CLJ 163; [1996] 2 MLJ 517. In the said case the Federal Court stated that there are two types of performance bond (which are essentially bank guarantees).

[53] The first relates to a conditional bond, in which the guarantor becomes liable upon proof of a breach of the terms of the principal contract by the principal and the beneficiary sustaining loss as a result of such breach. The guarantor's liability will therefore arise as a result of the principal's default.

[54] The second type relates to the unconditional or "on demand" performance bond which is drafted in a way that the guarantor will become liable when demand is made upon him by the beneficiary, with no necessity for the beneficiary to prove any default by the principal in the performance of the principal contract.

[55] The respondent contended that the authors of "*The Modern Contract of Guarantee*" (2nd edn.) p. 664 are of the view that the tendency of the English courts has been to treat the performance bonds as unconditional if there was a clear statement that the amount guaranteed was payable by the bank simply upon a written demand being made even if there might be in existence some contrary indications in other parts of the document. The said authors cited *Esal (Commodities) Ltd v. Oriental Credit Ltd* [1985] 2 Lloyd's Rep 546 case, where the bank "undertook to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance", where it was held that the latter words did not alter the fact that the money was payable upon a written demand being made as stated in the earlier part of the clause. The beneficiary of the bond did not have to show a failure to perform by the supplier in order to claim upon the bond.

[56] In the final analysis, what the respondent contended is that it is clear from the terms of the guarantee and the authority of the Federal Court above, that firstly the **notice of default** can only be made when there is a **default**

by the licensee to pay the royalty due; and secondly that a notice of default, which has the same effect as a **notice of demand**, must be given to the appellant (guarantor) as a **pre-condition for the enforcement of the respondent's right to be paid by the appellant** under the letter of guarantee. (emphasis added)

[57] Thus, the respondent's case is this: since the notice of default is a pre-condition or pre-requisite for the enforcement of the respondent's rights to payment under the letter of guarantee, the term of the letter of guarantee herein (which restricts the time within which a claim/notice of default may be made under the letter of guarantee in the event that the licensee defaults in payment of royalty it), **offends** the second limb of s. 29 and is thus to that extent, void. It is void because by **limiting** the time for making claims, through giving notice of default directly, it limits or restricts the time for the respondent to enforce its rights (to payment) under the letter of guarantee. (emphasis added)

[58] The respondent also touched on the issue of whether the impugned term limiting the period for making a claim under the letter of guarantee was ambiguous or otherwise, and whether the *contra proferentum* rule ought to apply such as to bring this case within the ambit of the judgment of the Court of Appeal in *MBf Insurans* case (*supra*).

[59] However, the judgment in the minority judgment ruled that making a claim is a preliminary step and precedes enforcement of a right and that making a claim does not involve action in a judicial proceeding. His Lordship Hishamudin's view is that **enforcing a right** in this appeal in the context of s. 29, is to **enforce payment** and is a separate issue from making a claim. (emphasis added)

[60] The respondent construed the above proposition to mean that the minority judgment's position is that enforcing a right under s. 29 means the institution of an action in court.

[61] The minority judgment however declined to hold whether the impugned term which limits the period for making claims under the letter of guarantee was ambiguous and whether the *contra proferentum* rule should apply, since His Lordship Hishamudin Mohd Yunus contended that these were not the only issues in this suit which the consent order of 25 September 2001 had stipulated for determination.

[62] Obviously the above observation of the minority judgment did not find favour with the majority judgment.

[63] The respondent's response to the minority judgment above is stated thus:

> That firstly, since the consent order calls for a "construction of guarantee" it must address this issue(s) even if it is incidental, because this would help in the interpretation of that term. Secondly the Respondent's response is

> that making a claim under a guarantee **expressly** requires "**a notice of default**" (which is similar to a demand) **to be served before** the Appellant (as Guarantor) makes payment thereunder 'within seven days on receipt of the notice; it is a critical component or step in the enforcement process of payment from the Guarantor (Appellant); that the Appellant's liability under the Letter of Guarantee only arises or invoked when the notice of default or "claim" had been **served** on the Appellant and he had seven days in which to pay up. (emphasis added)

[64] The respondent cited *Stimpson v. Smith* [1999] 2 WLR 1292 at p. 1304 is support, in which Tuckey J had stated that:

> … where the guarantee requires a formal demand to be made upon the surety it is not a condition precedent to his liability under the contract. It simply marks the time from which that liability may be enforced.

[65] It is the respondent's contention that the processes of 'making a claim' and 'enforcement of a right' are to be read conjunctively, meaning they cannot be segregated, since the latter comes right on the heels of the former. In other words, it is not open to separate the two processes. The respondent pointed out that even the judge in the minority judgment had conceded that making a claim is a "preliminary step" to 'enforcing a right'. And thus if time to making a claim under the guarantee is restricted, the impugned term imposing such a restriction is therefore bad and has the undeniable legal effect of limiting the time within which a party may enforce his rights. This goes to the root of the question – ie, that the impugned term in the letter of guarantee therefore offends s. 29 and is to that extent, void.

Distinction Between Limiting A Right And Limiting The Enforcement Thereof – The Appellant's Case

[66] In supporting the minority judgment, the appellant argued that the issue of limiting a right and limiting the enforcement of the right are distinctive. Much reliance was placed by the appellant on Indian authorities, in particular its interpretation of s. 28 of the Indian Contract Act 1872.

[67] It is the appellant's contention that the Indian courts had been consistent in holding that s. 28 of the Indian Contract Act 1872 only invalidates agreements which limit the time within which a party has to enforce his rights; but that it will not invalidate agreements which determine when a right arises or the time when a right will arise.

[68] In opposing the above view, the respondent took the position that Indian authorities on this particular statutory interpretation are merely persuasive and thus not binding on the Federal Court.

[69] The respondent's argument above is further fortified by its citation of the observation of the Supreme Court in the *New Zealand Insurance* case (*supra*) in which KC Vohrah J (as His Lordship then was) observed that:

A … This distinction between the existence of a right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this court in *Hock Hua Bank Bhd v. Leong Yew Chin*.

[70] The learned judge viewed the distinction as being mere semantics and
B that "we do not think that a right can be dissociated from its remedy. We are therefore of the opinion that condition 19 of the fire policy contravenes s. 29 of the Contracts Act, 1950".

[71] In view of the constant usage of the word, "right" it would be timely to now have regard to its meaning.

C

[72] According to the "*Oxford Companion to Law*" by David M Walker, the word "Right" is an over-used word. One can well agree with that.

[73] However in a legal context, the word ("right") denotes an advantage or benefit conferred on a person by rules of a particular legal system. A long
D and comprehensive interpretation of the word survives in the dictionary; but for our purposes here, it would suffice to say that it is essentially based on legal relationships between persons, determined by a rule of law and sanctioned and protected by a legal order, or sometimes as an interest recognised and protected by a rule of legal justice. Generally the counterpart
E or correlative of a legal right is a legal duty – in that if one person has a legal right of a particular kind, some other person or persons must be subject to a legal duty.

[74] Coming back to the appeal before us, it is the respondent's case that none of the Indian cases cited by the appellant considered the following
F pertinent points:

(a) That making a claim is a 'preliminary' step or essential pre-condition which must be taken or fulfilled in order to enforce the right for payment from the guarantor under the letter of guarantee; and

G (b) That the courts in Malaysia have consistently struck out or dismissed claims or suits filed to enforce payment under a guarantee **where no demand or proper demand has been made on the guarantor for payment of the guaranteed sum**. (emphasis added)

[75] The respondent went on to argue that had the above critical points
H been advanced or canvassed before the Indian courts, the latter would be obliged to give due consideration to the issue that if the time for making a claim is restricted by a term in the guarantee, that restriction has the effect of limiting the time for enforcement of the right for payment against the guarantor in a court of law; that this effect is overriding; since if the claim
I is bad/improper or made outside the period prescribed in the impugned term, the courts would hold the claim as being bad in law, invalid or ineffective and the suit against the guarantor will be struck out.

[76] Thus the respondent took the position that a "right" to make a claim under the letter of guarantee herein cannot be dissociated with the remedy that flows from or would arise after the making of the said claim, which is to enforce the claim against the guarantor (if he refuses to entertain the claim), by instituting an action in court. The words "All claims" in the impugned paragraph of the letter of guarantee has to be construed to mean and include the giving of the notice of default (which is the essential pre-requisite to any enforcement) **and** the filing of proceedings in the court to **enforce** the claim for payment of the sum so guaranteed. (emphasis added)

[77] The respondent contended that the usage of the words "All claims" used in the context of the letter of guarantee refers to not only claims made by way of service of the notice of default, but also any claim for remedies from a court of law to enforce the respondent's rights to payment of the guaranteed sum from the appellant.

[78] In construing the terms of the impugned letter of guarantee, the respondent favoured the objective approach as illustrated in the Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 which referred to and accepted the English decision in *Bank Credit and Commerce International SA v. Ali & Others* [2001] 2 WLR 735 where Lord Clyde held *inter alia* that "… the problem is not resolved by asking the parties what they thought they intended. It is the imputed intention of the parties that the court is concerned to ascertain. It is an objective approach which is required and a solution should be found which is both reasonable and realistic".

[79] Thus on the strength of this "objective approach", the respondent contended that in the interpretation of the letter of guarantee, the court should consider the appellant's contention that 'the parties have expressly agreed that for liability on the appellant to arise, a claim (demand) must be made during the guarantee period' – and that "the respondent had accepted that only when a proper demand has been made within the prescribed time, then only would the respondent have a cause of action to sue".

[80] Thus in following this objective test, the respondent contended further that parties to the contract must have knowledge (as reasonably available to them) in that a proper demand on the appellant is needed for the respondent to sue or have a cause of action which must be "to claim for reliefs from the court to enforce payment of the sum guaranteed or demanded". In other words, legally, a claim or demand is a very vital process which the respondent must comply with in order to enforce its rights in a court of law for payment under the letter of guarantee. Putting it in another way, the enforcement of that right under the letter of guarantee must start with the claim or proper demand.

[81] The respondent also cited the Federal Court case of *Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals* [2004] 2 CLJ 553 which held that the impugned term must be tested for its validity against the

provisions of s. 29 – which means that the impugned provision would be void if its effect is that a time limit is placed on the respondent to 'enforce his rights' under the guarantee.

[82] The respondent contended further that knowledge of certain facts are to be imputed to the appellant as reflected in the letter of guarantee itself.

[83] As s. 53 of the Forests Ordinance illustrated, both parties were fully aware of the specific purpose of the letter of guarantee and why it was provided by the appellant. The gist of it is that, the letter of guarantee was given *in lieu* of the licensee giving a cash deposit to the respondent and it was to secure payment for the respondent of all royalty and other sums due from the licensee for the period of one year from the date of the letter of guarantee. This was the purpose of the letter of guarantee. Thus the guaranteed amount claimed by the respondent in the civil suit represents royalty due from the licensee during the period specified in the letter of guarantee. The respondent referred to the judgment in the *MBf Insurans* case which showed that royalty could even be due from the licensee on the very last date of the guaranteed period – making it virtually impossible for the respondent to serve notice of default 'during the guarantee period'.

[84] Thus to a reasonable person it would be inconceivable that the respondent would have agreed that its security in the form of a guarantee provided by the appellant would be lost just like that – where the appellant is released from all liability under the letter of guarantee, without more, as soon as the guarantee period is over and even before the respondent has any reasonable opportunity to serve notice of default on the part of the licensee to the appellant/guarantor for the royalty due from the licensee.

[85] The respondent drew a line that this was the position even if parties had agreed that such were its rights under the letter of guarantee, since this approach is not supported by the 'objective approach' in the construction of the letter of guarantee.

[86] Thus the respondent's position is that the limitation on the time to make a claim by service of the notice of default directly limits the time within which to enforce the respondent's right under the letter of guarantee by any institution of legal action to compel the appellant to pay the guaranteed sum. Thus interpreted, the impugned clause would certainly be contrary and offensive to s. 29 of the Contracts Act 1950.

Decision

[87] After having construed the submission of both parties, we would answer the question posed before us in the negative for the following reasons:

[88] Firstly, the language of the letter of guarantee is vital; that should a guarantee **prescribes that a certain event must happen** before a cause of action accrues, for example, the making of a prior demand, then that has to be complied with before a cause of action can arise and a right to sue accrues;

in other words, it is our view that whether a prior demand is a condition precedent to the creation of liability in a guarantee, depends on the precise terms of the contract. (see *YM Orang Kaya Menteri Paduka Dato' Wan Ahmad Isa Shukri Wan Rashidi v. Kwong Yik Bank Bhd (2)* [1989] 2 CLJ 1288; [1989] 1 CLJ (Rep) 187; [1989] 3 MLJ 155). (emphasis added)

[89] Thus in the instant appeal if the language of the letter of guarantee is clear ie, where the said clause only prescribes a time limit for a demand to be made before a cause of action can arise, so be it. Its plain and ordinary meaning must be given.

[90] Following *Orang Kaya*'s case, where an obligation exists by virtue of a covenant, its extent is to be measured only by the words of the covenant.

[91] As such, a guarantor should not be made liable beyond the precise terms of his commitment (see *Orang Kaya Menteri Paduka*, *supra*).

[92] In the instant appeal, the said clause therefore **limits** when a right to sue or cause of action will accrue to the respondent. (emphasis added)

[93] In short, once the right to sue or cause of action accrues, it does not affect the six years limitation period within which the respondent may sue.

[94] Thus the liability of the guarantor depends very much on the language of that instrument and the nature of the liability it creates.

[95] It is our view that a guarantor is entitled to insist that the terms of his obligation are strictly observed by the parties; he cannot be made liable for more than he had undertaken or bargained for.

[96] In this connection there is a need to distinguish between limiting a right and limiting the enforcement of that right.

[97] As a matter of interest, s. 29 of the Contracts Act 1950 is derived from and is in *pari materia* with the **old s. 28 of the Indian Contract Act 1872**. (emphasis added)

[98] The Indian courts have consistently held that s. 28 only invalidates agreements which limits the time within which a person has to enforce his rights. It will not invalidate agreements which determines when a right arises or the time when a right will arise. In other words, there is the distinction between the accrual of cause of action and enforcement of cause of action. Time limitation on the accrual of cause of action does not infringe s. 29.

[99] This goes towards the question of the sanctity of contracts. As illustrated in *Pearl Insurance Co Ltd v. Atma Ram* AIR 1960 Punjab 236, the court's duty is to enforce a promise which parties have made. Since the clause does not limit the time within which the insured could enforce his rights and only limits the time during which the contract will remain valid, it does not breach s. 28.

[100] This rule is reinforced in the case of *State of Maharashtra v. Dr MN Kaur* AIR 1967 SC 1634. In this case, a contract has a prescribed period when it remained in force and a demand on it was made after the expiry of the validity period.

[101] It was held that the cardinal rule is that a guarantor cannot be made more liable beyond the terms of his engagement. As the guarantee terms had been accepted by parties and the time limit was integral to the guarantee, the contention that the guarantee was no longer enforceable was correct.

[102] The Supreme Court in *Food Corporation of India v. New India Assurance Co Ltd* AIR 1994 SC 1889 discussed the legal position clearly. It observed that:

> … since the period is provided under the agreement, the appellant had to move within this period asserting its right and apprising the company of the breach or violation by the Miller to enable it to either to pay or to persuade the Miller to pay itself. It does not directly or indirectly curtail the period of limitation nor does it anywhere provide that the corporation should be precluded from filing a suit after expiry of six months. It can utmost be construed as a condition precedent for filing of the suit that the Appellant should have exercised the right within the period agreed to between the parties. The right was enforced under the agreement when notice was issued and the company was required to pay the amount …

[103] Thus clearly, the Indian courts took the position (**under the old s. 28 Indian Contract Act 1872**) that an assertion of a right is one thing; the enforcement of that right in a court of law is quite another. Obviously the clause in the letter of guarantee only deals with the assertion of a right which is governed by the agreement and it is imperative that the party concerned must put the other party on notice by asserting his right, within a particular time as provided in the agreement. This would enable the other party to not only comply with the demand but to also be on guard, that in case it is not complied with, it may have to contend with proceedings in a court of law. (emphasis added)

[104] And again in the case of *National Insurance Co Ltd v. Sujir Ganesh Nayak & Co* [1997] 4 SCC 366, it was held that curtailment of the period of limitation to enforce a right is barred by s. 28; but the extinction of a right, unless exercised within a specified time is permissible.

[105] The position is clear as is aptly stated by the court in *Ruby General Insurance v. Bharat Bank Ltd* AIR (37) 1950 (East) Punjab 352. The court in this case observed that:

> … It is open to any two parties to agree that the promiser would only be liable if he is informed of the indemnification within the stipulated period, and there seem to be a great deal of sense in it particularly in the case of fire insurance or insurance against accident where the liability to the extent of the damage caused, when matters are fresh can be measured

with a certain amount of accuracy. Lapse of time in such cases may result in all kinds of claims which are not capable of determination with any amount of exactitude or when memories of men may become rather hazy.

[106] Thus, due to the Indian judicial trend as illustrated above, where their s. 28 of their Contract Act did not prohibit contracts which prescribed a time for a claim (demand) to be made, **their s. 28 of the Indian Contract Act 1872 was thus amended in 1997**. This is an important point to note. (emphasis added)

[107] Thus the current Indian s. 28 is an amended version. It is now couched in s. 28(b). The present s. 28 of the Indian Contract Act 1872 presently reads as follows:

28. Agreements in restraint of legal proceedings void:

Every agreement:

(a) by which any part thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period as to restrict any party from enforcing his rights, it void to that extend.

[108] It is apparent therefore that the Indian new s. 28(b) above would, from the construction of it, clearly invalidate the letter of guarantee clause, if it were to exist in Malaysia – comparatively, our s. 29 of the Contracts Act 1950 **contains no such provision as provided for in the current s. 28(b) of the Indian Contract Act 1872**. Thus taken contextually, we need to apply our s. 29 in accordance with its express terms and construe its plain and ordinary meaning. (emphasis added)

[109] It is commonplace for parties to a contract to regulate or modify their rights in the event of breach and the rights of accrual of any cause of action in any way they deem fit. This trite principle is best illustrated in the Privy Council decision of *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37; [1987] 2 MLJ 1, which was approved by the Federal Court in *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753; [1996] 2 MLJ 188 and subsequently in the Court of Appeal case of *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38.

[110] In *Insun*, the facts are these. The plaintiff Azali bin Bakar was the purchaser under a sale and purchase agreement dated 12 December 1984 ("the agreement") of a house to be erected by the defendant Insun Development Sdn Bhd, a corporate licensed developer ("the vendor"). The agreement was in the form prescribed in the Schedule to the Housing Developers (Control and Licensing) Regulations 1982.

[111] A dispute arose. The purchaser filed an originating summons for a declaration for entitlement of agreed liquidated damages for breach of contract on the purchase price of RM49,725 from 12 December 1986 to date of delivery of possession of the house. Alternatively the purchaser's claim was for a declaration as to entitlement to liquidated damages as aforesaid under the Housing Developers (Control and Licensing) Act 1966 and the regulations made thereunder, ie, the 1982 Regulations. The judge held that the purchaser was entitled to the primary declaration prayed for and entered judgment in his favour accordingly.

[112] For the record, the agreement was dated 12 December 1984 and by cl. 18 thereof, it was provided as follows:

> 18(1) The said building shall be completed by the vendor and vacant possession delivered to the purchaser within twenty-four (24) calendar months from the date of this agreement.
>
> (2) If the vendor fails to deliver vacant possession of the said building in time the vendor shall pay immediately to the purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.

[113] It was common ground that the house was not completed and available for delivery until 25 March 1994 and that there had been a delay from 12 December 1986 till 25 March 1994 on the part of the vendor in delivering vacant possession of the same.

[114] The purchaser's earlier demand for agreed liquidated damages was refused by the vendor. The vendor's defence was that the purchaser's claim was barred by s. 6(1) of the Limitation Act 1953.

[115] It was particularly contended that as the purchaser's claim was founded upon a breach of contract, ie, to say cl. 18, his cause of action accrued on the day following the time limited under the agreement for completion or delivery of vacant possession of the house. Based on this view, the purchaser had commenced the proceedings aforesaid more than seven months out of time and his claim was therefore barred by limitation.

[116] The judge in *Insun* relied on the decision in *Loh Wai Lian* (*supra*). In *Loh Wai Lian* the plaintiff/buyer had agreed to purchase and the defendant/developer had agreed to sell a shophouse to be construed by the developer. By cl. 17 of the contract it was provided as follows:

> Subject to clause 32 hereof and/or to any extension or extensions of time as may be allowed by the controller the said building shall be completed and ready for delivery of possession to the purchaser within eighteen (18) calendar months from the date of this agreement. Provided always that if the said building is not completed or ready for delivery of possession to the purchaser within the aforesaid period then the vendor shall pay to the purchaser agreed liquidate damage calculated from day to day at the

rate of eight percentage (8%) per annum on the purchase price of the said property for such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser.

[117] The applicable legislation in *Loh Wai Lian* (*supra*) was the Housing Developers (Control and Licensing) Rules 1970 ("the 1970 Rules"), r. 12(1) of which provided that:

Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely …

[118] There were twenty one matters set out which were required to be incorporated in the contract of sale. But for the present purposes, the following matters are relevant:

(i) Provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall be not be later than 18 months after the date of signing of the contract of sale …

(ii) Provision binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight percent of the purchase price after the date of delivery of vacant possession as specified – the contract of sale …

[119] It is important to remember that cl. 17 gave a formula for the computation of the agreed liquidated damages which defined not only its opening date but also its closing date.

[120] There was delay in the completion of the shophouse. It was completed only on 7 November 1977. When the developer refused to pay the buyers' demand for liquidated damages for late delivery, the plaintiff/buyer commenced action against the developer for liquidated damages for breach of contract. In an O. 14 proceedings before the Senior Assistant Registrar the plaintiff/buyer succeeded, but on appeal before the judge in chambers, the developer's contention that the plaintiff/buyer claim was barred by s. 6(1) by the Limitation Ordinance 1953, was upheld. The order of the Senior Assistant Registrar was set aside.

[121] The plaintiff/buyer appealed to the Federal Court. The buyer's contention was that having regard to the provision to cl. 17 of the contract, the cause of action was not complete until the shophouse was actually completed and vacant possession given to her and that based on this date, she had commenced proceedings well within the time limited by the statute.

[122] Thus before the Federal Court, the plaintiff/buyer relied on several authorities such as *Turner v. Midland Railway Co* [1911] 1 KB 832, *Central Electricity Generating Board v. Halifax Corp* [1962] 3 All ER 915 at p. 923,

which are authorities for the proposition that where the mode of assessing liquidated damages had been agreed, time will not run from the date of the breach but from the date when the damages can be ascertained.

[123] The plaintiff/buyer contended that in view of the *proviso* to cl. 17, the cause of action was not complete until the shophouse was actually completed and vacant possession given to her. However the Federal Court said that:

> Such a proposition would in fact mean that if the Respondent did not complete the shophouse, accrual of cause of action could be postponed indefinitely. We do not think that the provision to clause 17 of the agreement could have that effect on the Limitation Ordinance in an action founded on contract. **A distinction must clearly be recognised between a cause of action and the relief claimed**. The date of completion of the shophouse was only necessary to quantify the maximum relief under clause 17 which could be done subsequently by evidence. It could not constitute an impediment to the cause of action being complete. The breach had occurred on 18 September 1975 giving rise to a complete cause of action, and the accrual of cause of action would not be postponed by temporary lack of evidence pertaining to maximum relief claimable resulting from such breach irrespective of whether the damages claimed were liquidated or unliquidated. In the circumstances of the present case, we would not agree to the proposition that the cause of action was not complete until the shophouse was completed. (emphasis added)

[124] The Federal Court distinguished the case of *Turner* and *Central Electricity Generating Board* (*supra*) and said *inter alia*, that cl. 17 itself had provided that such damages were to be calculated on a day to day basis from the date of breach with the date of actual completion to be used for the purpose of calculating the maximum days claimable. Thus even a day after the date of breach of liquidated damages could be ascertained under cl. 17. In any event if the present statement of claim had been filed on or before 17 September 1981, no court could have struck it out as disclosing no cause of action merely because the maximum liquidated damages claimable were not quantified. The action was not an ordinary claim for money due and owing, the sum of which ought to be ascertained.

[125] Undeterred, the plaintiff/buyer pursued her appeal to the Privy Council (see [1987] 2 MLJ 1). The Privy Council vindicated the plaintiff/buyer in unanimously deciding in her favour in allowing the appeal, thereby restoring the order of the Senior Assistant Registrar who gave summary judgment.

[126] The point for decision before the Privy Council was the crucial issue of when did the cause of action accrue, having regard to the particular contract before them, for it was with effect from the date, that time started to run for the purposes of the Limitation Act 1953.

[127] Their Lordships took the position that it was critical to firstly identify the true nature of the developer's obligation. Their Lordships *inter alia*, pointed out that "the analysis of the accrual of the appellant's cause of action depends not upon the label which was put upon the sums which the respondent became obliged to pay, but upon what, on the proper construction of the contract, was the true nature of the respondent's obligation".

[128] And in deciding the question what the true nature of the vendor's obligations was, Their Lordships put great emphasis on the 1970 Rules and the *proviso* to cl. 17 of the contract of sale. Their Lordships observed that:

> … The starting point is that this contract is one of the terms which are regulated by statute and which therefore falls to be construed in the light of the statutory provisions to which it was designed to give effect.

[129] In short, Their Lordships recognised that the general rule was that a purchaser's right of action for damages would accrue on the date of the breach of contract (*Nasri v. Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32. However *parties to a contract are free to regulate or modify their rights in the event of breach thereof in such a manner as to postpone the date of accrual of their right to sue for damages* which was what *had happened* in *Loh Wai Lian*. (emphasis added)

[130] However there is a material difference between the contract of sale in *Loh Wai Lian* and the agreement in *Insun*.

[131] In *Loh Wai Lian* the statutory formula for the calculation of the indemnity was modified by expressing statutorily not only the opening date but also the closing date, which was the date of actual completion and delivery of possession. But in the case of *Insun*, although there is, by cl. 18(2), also a formula for the calculation of liquidated damages, it only specifies the opening date but not the closing date.

[132] The Federal Court in *Insun* found this difference to be material. The Federal Court observed that it is obvious from the Privy Council judgment in *Loh Wai Lian* that but for the unusual language of cl. 17 of the contract of sale which had provided a formula for the completion of damages payable by the developer to the buyer for delay, by defining not merely the opening date required under r. 12(1)(r) of the 1970 Rules but also the closing date – not required under r. 12(1)(r) – the case would have been decided differently. This is because Their Lordships had observed that:

> "If the question is asked in the absence of such an express provision when would the purchaser's right of action for damages for breach of contract accrue?", the answer is plainly the date on which the breach occurred. But parties to a contract are, of course, entitled to regulate or modify their rights in the event of breach in any way that they think fit and the accrual of any cause of action then becomes a matter of the correct construction

A of what they have provided. This appeal raises no point of principle but simply a question of what is the true construction of the contract in which the parties entered. (emphasis added)

[133] In view of the above, the Federal Court in *Insun* held that the reasons stated in *Loh Wai Lian* are distinguishable from the facts in *Insun* and that B the judge was wrong in holding that it was of decisive importance to the question which arose for decision.

[134] The Federal Court in *Insun* answered the question in this way; because the agreement by cl. 18(2) had provided for a formula for the calculation of liquidated damages which defined the opening date but not the C closing date, the purchaser's right of action for damages for breach of contract – following the general rule, accrued on the date of the breach which in this case, was the day after the time limited under cl. 18(2) for the delivery of vacant possession ie, on 12 December 1986. Thus the purchaser, having commenced proceedings only on 31 July 1993, was more than seven months D out of time.

[135] The Federal Court concluded that the purchaser's claim was statute – barred under the provisions of s. 6(1) of the Limitation Act 1953.

[136] Thus as the authorities above have clearly shown, it is trite that E parties to a contract are **entitled** to regulate or modify their rights in the event of breach and the rights of accrual of any cause of action in any way they deem fit. (emphasis added)

[137] Coming back to the appeal before this court, it is clear that parties have expressly agreed that for liability on the part of the appellant to arise, F a claim (demand) must be made during the guarantee period. In fact even the majority in the Court of Appeal had agreed that the word "claim" in the said clause meant a demand.

[138] It might be expressed here that the respondent was actually on a sound footing in that it had equal bargaining power with the appellant and G Niah Native. It knew exactly where it stood as regards its rights under the letter of guarantee. It was free to reject the letter of guarantee at the very outset should the said clause be viewed as being adverse to its interests.

[139] But it chose to live with it and in fact accepted that only when a proper demand had been made within the prescribed time, would it then H have a cause of action to sue. And consequently it has the normal run of six years in which to sue the appellant.

[140] We have taken pains to illustrate the Indian authorities, for a reason. It is to indicate the distinction between an agreement prescribing the time limit in which a cause of action may arise (and then giving rise to a right to I sue), and an agreement which limits the time period for suing.

[141] The majority judgment cited two authorities ie, *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 CLJ 44; [1992] 1 CLJ (Rep) 230; [1992] 1 MLJ 185 and *MBf Insurans Sdn Bhd v. Lembaga Penyatuan dan Pemulihan Tanah Persekutuan (FELCRA)* [2007] 6 CLJ 639; [2008] 2 MLJ 398.

[142] Looking firstly at the *New Zealand Insurance* case, it is seen that the relevant clause therein **differs** from the relevant clause in the instant appeal. (emphasis added)

[143] The clause in the *New Zealand Insurance* case reads:

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

[144] Thus in the *New Zealand Insurance* case, a claim demand was submitted to the insurance company within the validity period but it was rejected. The beneficiary then filed a suit after the expiry of the twelve months period as prescribed in the clause. It was alleged by the insurance company that the claim was invalid since it was filed late, outside of the twelve month period. The then Supreme Court held that such a clause would be rendered void by s. 29.

[145] To reiterate, the facts in the instant appeal differs from the facts in the *New Zealand Insurance* case, since the latter case involved a claim made within time although the suit was filed outside of the agreed period. One other authority relied upon by the majority judges in the present appeal is the *MBf Insurans* case (*supra*). The majority judges were in agreement with Sri Ram FCJ (as His Lordship then was), who took on a 'commercial common sense approach' in interpreting the subject clause.

[146] The subject clause in the *MBf Insurans* case reads as follows:

> This guarantee will expire on 14th June 1991. Claims, if any must be received on or before this date.

[147] Interestingly, Sri Ram, FCJ (as His Lordship then was) made no reference to s. 29 nor approached this clause with s. 29 in mind. His Lordship went on the basis that the insurance company's guarantee was intended to cover an event or breach occurring during the validity period of the guarantee. Which means that even if a claim (demand) was made after the expiration of the validity period, it would not be fatal.

[148] One might well ask: What was the rationale for such an approach?

The answer lies in the fact that if for example, a breach occurred just before the expiry of the guarantee, say on the eve of it, the beneficiary may not be able to make the demand on time in relation to such breach before the

guarantee expires. Thus Gopal Sri Ram FCJ held that even if a claim (demand) was made after the validity period of the guarantee, it would still be valid as "this accords with business common sense".

[149] It is our view that the above approach is, with respect, not in accord with the following principles:

(i) That parties can freely agree on the terms governing when and how their right of action will arise;

(ii) That if the parties have prescribed a cut-off date for a demand to be met, **that** would represent the business common sense provision. Otherwise any cut-off date would countenance the same problem as posed by Gopal Sri Ram FCJ himself, that there may always be a default which may arise perhaps on the brink of the prescribed period. (emphasis added)

[150] It was for the parties to agree and accept what would be a suitable cut-off date.

[151] The other judge in the *MBf Insurans* case went on to hold that the material clause was invalid as it breached s. 29, in that it restricted the plaintiff's statutory period for bringing an action under the Limitation Act 1953.

[152] A factor which is often neglected is this: that insurance contracts are *uberrimae fidei* contracts – (ie, contracts of "utmost good faith").

[153] As the Court of Appeal stated clearly in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710:

> … It is settled beyond dispute that a contract of insurance is one that imposes a mutual duty on the parties to it to act *uberrimae fidei* towards each other.

[154] Considering the fact that insurance companies obtain premium payments in exchange for their insurance coverage, it would be in bad faith for an insurance company to avoid liability by putting a time limit for which a claim on their undertaking has to be made.

[155] Courts should be mindful in following the decisions of both authorities of *New Zealand Insurance* and *MBf Insurans*.

[156] Having said that, it is a truism that a guarantee unlike an insurance, is not a contract *uberrimae fidei*. This observation was stated clearly by the Federal Court in *Heng Cheng Swee v. Bangkok Bank Ltd* [1979] 1 LNS 179; [1976] 1 MLJ 267, where it was held that a contract of guarantee depends primarily on its expressed terms and cannot be varied by oral evidence; secondly, to determine the defendant's rights which are embodied in the guarantee, it is only necessary to look at the guarantee itself.

[157] The same approach was taken by the Rt Hon Justice Arifin Zakaria when His Lordship had occasion to interpret a contract of guarantee in *Talasco Insurance Sdn Bhd v. Lembaga Kemajuan Pahang Tenggara (DARA)* [1996] 1 LNS 342; [1996] MLJU 582 where His Lordship observed that:

> In the construction of a contract of guarantee it has also been said that a rigid adherence to the terms of the agreement need to be observed. As stated by the Court in *Blest v. Brown* [1862] 45 ER 1225:
>
> > ... It must always be recollected in what manner a surety would bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore merely according to the proper meaning and effect of the written engagement that he has entered into.

[158] Likewise, in the case of payment made for performance bond or guarantee, there has to be strict compliance with the terms of the said performance bonds or guarantees, as illustrated in authorities such as *Teknik Cekap Sdn Bhd v. Public Bank Bhd* [1995] 4 CLJ 697; [1995] 3 MLJ 449 and *Kerajaan Malaysia v. South East Asia Insurance Bhd* [2000] 3 CLJ 705; [2000] 3 MLJ 625.

[159] The above view was as far as the majority judgment went. As regards the dissenting judgment of Justice Hishamudin Mohd Yunus, a clear distinction is outlined between making a claim (demand) and enforcing a right. The minority view is that s. 29 only relates to limiting the time for enforcement of a right.

[160] As had been expressed earlier, the demand was made six months after the validity period had expired, which means that the respondent's cause of action did not arise. However should the demand have been made within time (ie, before the expiry of the validity period), the respondent is entitled to enforce his right to payment any any time before the expiry of the period under the Limitation Ordinance.

[161] The claim or right to the payment by the respondent under the letter of guarantee would be triggered when there was a default by Niah Native. At the occurrence of the default, the affected party was entitled to the payment and the claim must be made during the validity period for it to be a valid claim. The affected party was required to express the assertion or the right to make a claim so as not to amount to a waiver of his right to the payment.

[162] A notice was required from the respondent to the appellant to notify and to prove that the first defendant had breached his obligation and default had occurred. In the event the claim was unsuccessful, further action would be needed by the respondent, for instance by instituting an action in a court of law. This is the enforcement of one's right, which is the second procedural step subsequent to the making of a claim, in the event the claim was not entertained.

[163] In this context, a guarantee is given to make a payment in the event a default occurs and thus it would be reasonable for such obligation to pay by a guarantor within the valid guarantee period.

[164] A letter of guarantee is a type of contract given by a bank that will guarantee its customer's business purchaser if the customer defaulted. Normally, the customer would have the value of the said letter of guarantee held in a cash collateral account during the period the letter of guarantee is in effect.

[165] Thus payment is due when there is a default which had occurred during the guarantee period and this validity period to claim would conform to the contract between the guarantor and its customer. It must be of a certain or specific period of time, to avoid uncertainty that entails in fulfilling the financial obligations on the guarantor's part.

[166] Thus the period that comes with making the claim is a limitation to asserting one's right to claim. In the literal interpretation of the said terms of the letter of guarantee we are unable to see how the terms restrict the respondent from enforcing his rights by way of legal proceeding. Neither does the term implies that a party is impeded from taking legal action under the letter of guarantee – because if the claim is satisfied, the question of enforcing the right does not arise.

[167] Looking at the provision of s. 29, the dissenting judgment suggested that s. 29 is only concerned with time limitation as to the enforcement of a right.

[168] As s. 29 clearly stipulated:

> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceeding in the ordinary tribunals, or which limits the time within which he may thus **enforce his rights**, is void to that extent. (emphasis added)

[169] The operative words are "enforcing his rights". The legal definition of "enforce" *inter alia*, includes to "enforce is to put in execution of a judgment." (*Stroud's Judicial Dictionary of Words and Phrases*, 7th edn, vol I, Thomson Sweet & Maxwell 2006 at p. 841).

[170] Thus the word means to ensure observance of or obedience to (a law, decision) or to impose by force. Clearly the word is synonymous with the words "impose" and "execute" which would come with the force of law or by way of court judgment.

[171] It would be instructive to look at the legal issue in the context of enforcement under the English law of guarantee. There, it is stated that a creditor who wishes to enforce a contract of guarantee against a surety will have to ensure that his cause of action has accrued. (see "*Law of Guarantee*" by Geraldine Andrews & Richard Millett, 6th edn, Sweet & Maxwell, 2011). Bank guarantee forms contain an express provision for the guarantor to

discharge his liability to the bank on service of a written demand on him. The requirement of demand is procedural for the benefit of the surety and is therefore waivable by him.

[172] It has been decided that payment is required to constitute a demand and this definition has been affirmed by the Privy Council in *Financial Institutions Services Ltd v. Negril* [2005] 2 LRC 351 whereby a letter pressing for a reduction in the principal's indebtedness constitute a demand for the purpose of outstanding mortgages. Thus the law requires that a demand is needed, not as a precondition of liability but as a notice to claim unless it is waived.

[173] One other point of comparison can be found in the case of a guarantee payment situation in the case of a performance bond in construction works. In this kind of situation, contractors in construction works are required to provide a performance bond as security to complete the construction project. It is a 'guarantee' in layman's term by the contractor to construct and complete the construction project until completion. It differs slightly from a letter of guarantee in terms of value attached to it where the bond is of the amount of a percentage of the value of the contract sum of the project. As a condition prior to commencement of the contractor's works, the contractor provides a performance bond to the employer. In the event a breach or default occurred during the construction works of the project, a party's rights would depend on the provisions of the contract and the bond, but where it is an unconditional bond, the employer (the owner or occupier of the construction project) is allowed to make its claim by demanding for the bond without giving any reason. The point is this: that although the breach had occurred and the affected party is entitled or has the right in law to the performance bond, the affected party must still notify its claim by calling for the bond to the bank. (see *Esso Petroleum Malaysia Inc v. Kago Petroleum Sdn Bhd* [1995] 1 CLJ 283; [1995] 1 MLJ 149) and it must be done within the validity period.

[174] In the present appeal, the other terms of the letter of guarantee are also instructive. In the recital it is stated that in consideration for the company not being required to deposit a sum of money as provided for under s. 53 of the Forests Ordinance, the appellant guaranteed to the respondent "the payment of all sums of" money which may be due to the Government of Sarawak for the payment of royalty or other sum due under licence No. T/0169 for a period of one year for date hereof. This can be seen as a consideration for the guarantee which is a condition as required by the Forests Ordinance, an alternative to the licensee to operate its business without advancing the money to the respondent which in itself is not wrong in law and is therefore not a bad policy. Thus, if the term of the letter of guarantee is void by arguing that it falls under s. 29, then would the act of issuing the guarantee as a consideration for not depositing a sum of money under the Forests Ordinance of Sarawak be void under s. 29? Surely not.

[175] Thus, it is our view that the time period is a limitation for the making of a claim in the event of a default. Following the ordinary meaning of the language of the letter of guarantee, as accepted by the respondent and the guarantor, the claim must be made within the guarantee period upon an event of default. The word "claims" which entails a demand for the payment when default occurs should be construed in its ordinary sense and meaning and thus the limitation paragraph does not amount to restricting one's right to enforce under s. 29.

[176] The impugned clause of the letter of guarantee therefore does not offend s. 29 and thus the question posed is answered in the negative. Consequentially the majority judgments of both the Court of Appeal and the High Court are hereby set aside as we find that the minority judgment in the Court of Appeal represents the correct view. In the circumstances we allow this appeal with costs.

[177] Costs to the appellant.

Deposit refunded to appellant.